STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 13, 2005
V	No. 257442 Delta Circuit Court
GORDON LLOYAL TODD, Defendant-Appellant.	LC No. 03-007152-FH

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of operating a vehicle while under the influence of intoxicating liquor, third-offense, MCL 257.625(8)(c), and driving on a suspended license, second or subsequent offense, MCL 257.904(3)(b). We affirm.

On September 5, 2003, Escanaba County Public Safety Officer Timothy Moore was parked in his patrol vehicle when he observed two motorcycles pass his position. Moore testified that the driver of the first motorcycle, who he identified at trial as being defendant, was not wearing a helmet. Three of defendant's friends testified that defendant was the passenger, not the driver of the motorcycle. Moore followed the motorcycles and then approached defendant after he had stopped and parked. Moore noted that defendant smelled of intoxicants. Defendant refused to take any field sobriety tests. A subsequent blood test revealed a blood alcohol level of 0.15.

During jury deliberations, the jurors forwarded a note to the trial court indicating that they "would like to go to the site where the officer was parked to see his vantage point." The trial court stated on the record that it had shared the note with counsel, and the court further stated:

> We've talked about this informally. I indicated there's some different ways we could do it. We could all go there as a group with the court reporter, the attorneys, myself, the bailiff, the defendant, but we wouldn't and couldn't say anything, we would simply be along with the jury and then come back. Another way, it's a very simple place to find, it's a few blocks from the courthouse, we could simply wait here and let the jury go, give them essentially instructions not to do any deliberations there, simply go, make whatever observations they want, and then come back to the jury room and resume their deliberations. It seemed to

be the consensus that we would give the jury that latter instruction, to allow them to go, make the view, not deliberate in the process, and defer their deliberations until they came back to the jury room.

The trial court followed by asking counsel if conducting the jury view in this manner was satisfactory, and the prosecutor and the defense attorney voiced their approval. The transcript does not reflect any statements by defendant himself. However, there is nothing that leads us to believe that defendant was not present during this exchange on the record, and defendant makes no claim on appeal that he was not present. At the hearing on defendant's motion for new trial, defendant's appellate counsel called defendant's trial counsel as a witness, and his testimony was taken. Trial counsel indicated that he did not feel it necessary to attend the jury view because the location of the view was only a couple of blocks from the courthouse, because the judge promised to and did in fact instruct the jury not to conduct any experiments or deliberate while at the scene, and because the bailiff would be accompanying the jurors. Counsel did not discuss defendant's constitutional rights with defendant at the time, nor had constitutional issues been discussed with the trial court while in chambers. Following counsel's decision to forgo the jury view, he spoke to defendant about the matter, and defendant did not voice any concerns.

The jury was brought into the courtroom and instructed as indicated above, with the court emphasizing that the jurors could only view the scene and nothing more. The trial court also indicated that the bailiff would accompany the jury to the view. The jury proceeded to the scene with the bailiff and returned to the courtroom shortly thereafter. The jury then convicted defendant. There is nothing in the record to suggest that any improprieties occurred during the view.

On appeal, defendant presents three arguments. First, he argues that his constitutional rights were violated when the jury view was conducted without his attorney being present, where the jury view was a critical stage of the proceedings, and where he did not knowingly, voluntarily, and intelligently waive his right to counsel. Second, defendant argues that his right to be present at the jury view was violated, where there is no record showing that he was informed of this right and that he knowingly and intelligently waived the right. Third, and finally, defendant argues that counsel was ineffective because he did not advise defendant of his right to have counsel present at the jury view, nor did counsel advise defendant that defendant himself had a right to be present at the view.

"Permitting the jury to view the crime scene is a matter within the discretion of the trial court. That discretion exists even after the jury has begun its deliberations." *People v Mallory*, 421 Mich 229, 245; 365 NW2d 673 (1984)(citations omitted). In *People v Auerbach*, 176 Mich 23, 47-48; 141 NW 869 (1913), our Supreme Court stated that a defendant has the right to be present at a jury view. In *Mallory, supra* at 247, the Michigan Supreme Court found that a defendant's right to be present at a jury view stems from the fact that a jury view is part of the trial. In conjunction with this finding, the *Mallory* Court noted that a criminal defendant has a statutory right, MCL 768.3, to be present during his or her trial. *Id.* at 245-246. Furthermore, MCR 6.414(D) provides:

> The court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the

> view, no person other than the officer designated by the court may speak to the jury concerning a subject connected with the trial.

We find it unnecessary to determine whether a jury view is a critical stage of the proceedings as counsel's presence was waived by virtue of the express agreement not to attend the view, where defendant, at the time of counsel's approval of the court's plan, was being fully represented by counsel, who was necessarily speaking on defendant's behalf regarding the jury view. This is not a situation in which defendant would be continuing pro se with respect to the jury view; defendant still retained counsel throughout the proceedings. A decision not to attend the view was made by counsel, and defendant did not raise any concerns.

In *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000), our Supreme Court discussed the principle of waiver:

> Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.'" It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error."
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> In the present case, counsel clearly expressed satisfaction with the trial court's decision to refuse the jury's request and its subsequent instruction. This action effected a waiver. Because defendant waived, as opposed to forfeited, his rights under the rule, there is no "error" to review. [Citations omitted.]

There is no indication whatsoever in the record that defendant or counsel was under the belief that they could not or were not entitled to attend the jury view should they so desire. Rather, the trial court informed the parties that one way of proceeding would be to have everyone present; however, the parties opted for a different approach. While we recognize that in a typical situation a defendant must personally waive the right to counsel before proceeding pro se, as opposed to an attorney acting on the defendant's behalf, *Carter, supra* at 218, in the unique situation that played out here, we conclude that defendant was not improperly deprived of his right to counsel.

To require, as defendant urges, that the court obtain a knowing, voluntary, and intelligent waiver of defendant's rights from defendant himself under the circumstances, after counsel already agreed that the jury view could be conducted without his and defendant's presence, could potentially turn court proceedings into behemoths, where courts would have to follow up by receiving confirmation from a defendant after decisions were previously made and arguments advanced by counsel representing the defendant. Having counsel and defendant present at the jury view was waived. Defendant's right to be present at the jury view was waived when counsel, acting on behalf of and representing defendant, specifically and affirmatively approved a jury view attended solely by the jury and the court officer. There was no need for an additional inquiry by the court whether defendant knew of his rights and whether defendant wished to be present. As noted in *Mallory, supra* at 248, "a defendant may waive his right to be present at a jury view by affirmative consent[.]" There is nothing in *Mallory* which suggests that counsel

alone cannot effect the waiver; there is no language indicating that the waiver must be procured from counsel and then the defendant himself.

In further support of our position, we direct attention to *People v Simmons*, 140 Mich App 681, 682; 364 NW2d 783 (1985), in which the defendant claimed "that the trial court erred by not insisting upon an on-the-record waiver by defendant of his right to testify in his own behalf." This Court concluded that "no such procedure is required[.]" *Id.* The *Simmons* panel, after first acknowledging that the right to testify is entrenched in concepts of liberty and that it has attained constitutional status, elaborated:

> This conclusion does not resolve the instant matter, however. For example, the right to secure witnesses for the defense is also a fundamental right, US Const, Am VI; Const 1963, art 1, § 20, yet we have held that selection of defense witnesses, if any, is a strategic consideration left to the trial attorney. *People v Harlan*, 129 Mich App 769, 779; 344 NW2d 300 (1983); *People v Grant*, 102 Mich App 368, 374; 301 NW2d 536 (1980). We agree with the majority of courts which have addressed the issue and decline to require an on-the-record waiver of defendant's right to testify. Such a requirement would necessarily entail the trial court's advising defendant of his right to testify. As the Wisconsin Supreme Court stated . . ., a formal waiver requirement might "provoke substantial judicial participation that could frustrate a thoughtfully considered decision by the defendant and counsel who are designing trial strategy." [*Simmons, supra* at 684.]

This Court concluded that, if a defendant decided not to testify or acquiesces in his attorney's decision that he not testify, the right to testify will be deemed waived. *Id.* at 685.

The right to testify is, minimally, at least as important as the right to be present at a jury view, and thus, once defense counsel here expressly agreed in allowing the jury view without his or defendant's participation and defendant acquiesced in counsel's position by not voicing any concerns to counsel, the right of presence was waived.

With respect to the ineffective assistance of counsel claim, in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the

> proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Here, we are not prepared to find that counsel's performance was deficient. In regard to the lack of information provided to defendant by counsel with respect to defendant's rights, we note, with some significance, that defendant makes no claim that he would have chosen to proceed in a different manner had he been advised of his rights. Again, there is also no claim that defendant was under the impression that he was not entitled to be present. Moreover, under the circumstances presented, we cannot conclude that counsel's failure to demand a presence at the jury view constituted deficient performance, taking into consideration the reasons cited by counsel at the hearing on the motion for new trial. Defendant has failed to overcome the strong presumption that counsel's performance constituted sound trial strategy. Moreover, assuming deficient performance, and considering the facts of the case, along with the surrounding circumstances and the timing of the jury view, i.e., during deliberations, which would not have permitted any further argument or commentary by the parties following the view, defendant has not shown the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ William B. Murphy